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IN THE SUPREME COURT  
STATE OF ARIZONA

In the Matter of  
PETITION TO AMEND RULES 4.2, )  
6.1, 6.5, 6.6, 7.2, and 7.4, ARIZONA )  
RULES OF CRIMINAL )  
PROCEDURE )  
\_\_\_\_\_ )

Supreme Court No. R-21\_\_\_\_\_  
(expedited consideration requested)

Pursuant to Rule 28 of the Arizona Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts, respectfully petitions this Court to amend Rules 4.2, 6.1, 6.5, 6.6, 7.2, and 7.4, of the Rules of Criminal Procedure, on an expedited basis. These changes are proposed in furtherance of this Court's Fair Justice Task Force recommendations to better ensure that cash bonds do not cause unnecessary pretrial detention.

**I. Background and Purpose of the Proposed Rule Amendments.** The Task Force for Fair Justice for All recommended "best practices for making release decisions that protect the public, but do not keep people in jail solely for the inability to pay bail" and made recommendations in a Task Force [report](#). National and local statistics reviewed by the Task Force indicated a significant number of

people incarcerated pretrial were there *solely* because they cannot afford to pay a bond. Research shows that “detaining low-risk and moderate-risk defendants, even for a few days strongly correlates with higher rates of new criminal activity both during the pretrial period and years after case disposition; as length of pretrial detention increases up to 30 days, recidivism rates for low-risk and moderate-risk defendants also increases significantly.”<sup>1</sup> As the Task Force learned, unsecured bonds are equally effective as bonds secured by payment of money in incentivizing people to meet their appearance obligations. In response to Task Force recommendations, rule amendments were proposed in petition R-16-0041 that directed judges to make an individualized determination of a defendant’s risk of non-appearance, risk to the safety of the community, and finances, and that prohibited use of a bond schedule that called for a bond amount based on the charge or some other consideration. The amendments adopted by this Court moved Arizona’s criminal justice system away from reliance upon money bail and toward conditional release based on an individualized assessment of a defendant’s risk profile.<sup>2</sup>

The rule amendments proposed by this petition are designed to move Arizona further in the direction of risk-based assessment and release conditions. A

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<sup>1</sup> *Justice for All: Report and Recommendation of the Task Force on Fair Justice for All* (Arizona Supreme Court, August 16, 2016) at p. 27, available at: <http://www.azcourts.gov/Portals/0/FairJusticeArizonaReport2016.pdf>

<sup>2</sup> Ibid 28-29

proposed mandatory bail review hearing following the initial appearance would provide the process due for those defendants detained on a bond they cannot pay. This is consistent with a series of decisions by the United States Court of Appeals for the 5<sup>th</sup> Circuit holding that both due process and equal protection require that an indigent defendant unable to pay a monetary bond must be afforded effective procedural due process for determination of bail conditions.

Misdemeanor defendants ... have a constitutionally protected state-created liberty interest in being bailable by sufficient sureties before trial. If a misdemeanor defendant has executed an affidavit showing an inability to pay prescheduled money bail ... then the defendant is entitled to a hearing within 48 hours of arrest in which an impartial decision-maker conducts an individual assessment of whether another amount of bail or other condition provides sufficient sureties. At the hearing, the arrestee must have an opportunity to describe evidence in his or her favor, and to respond to evidence described or presented by law enforcement. If the decision-maker declines to lower bail from the prescheduled amount to an amount the arrestee is able to pay, then the decisionmaker must provide written factual findings or factual findings on the record explaining the reason for the decision, **and the County must provide the arrestee with a formal adversarial bail review hearing before a County Judge.** (emphasis added)

ODonnell vs. Harris County, 892 F.3d 147, 165 (5<sup>th</sup> Cir. 2018)

Regarding felony defendants, the New Mexico Supreme Court held unconstitutional the practice of setting a high money bond for the purpose of preventing release. In [State v. Brown](#), 338 P.3d 1276 (2014) the court ruled that setting a defendant's bail bond solely on the nature of the charged offense violated the state Constitution and New Mexico rules of criminal procedure.

Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release. See N.M. Const. art. II, § 13; Rule 5-401; see also Bandy, 81 S. Ct. at 198 ("It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom."). Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether. If a defendant should be detained pending trial under the New Mexico Constitution, then that defendant should not be permitted any bail at all. Otherwise the defendant is entitled to release on bail, and excessive bail cannot be required. N.M. Const. art. II, § 13; cf. 18 U.S.C. § 3142(c)(2) (providing that a federal "judicial officer may not impose a financial condition that results in the pretrial detention of the person"), *held unconstitutional on other grounds by, e.g.,* Karper, 847 F. Supp. 2d 350.

Similarly, setting high bail at the initial appearance to prevent release is inconsistent with the Arizona constitutional, statutory, rule, and case law requirements for denying bail. The proposed requirement for a bail review hearing will provide the full and fair opportunity for the parties to argue and the court to determine whether either a high bond is reasonable and necessary under the rules or denial of bail eligibility under the standards and procedures provided by law is warranted.

As proposed by amendments to Rule 7.4 of the Rules of Criminal Procedure, after an initial appearance that results in detention of the defendant due to a monetary bond, a bail review hearing would be required within 5 days in a misdemeanor case and within 7 days in a felony case. At this hearing, the court must determine whether to modify bail to impose only non-monetary conditions or

a less onerous monetary bond. To maintain the monetary bond, the state would have the burden to prove it is “the least onerous alternative” that “is reasonable and necessary to secure the defendant's appearance or to protect another person or the community from risk of harm by the defendant,” as required by Rule 7.3(c). This burden of proof is consistent with the principle that “[i]n our society, liberty is the norm and detention prior to trial or without trial is the carefully limited exception.” United States v. Salerno, 481 U.S. 739, 755, 107 S.Ct. 2095, (1987)

The defendant would be afforded the opportunity to cross-examine and call witnesses and to present other evidence regarding reasonable and necessary conditions of release. Based on this evidence the court would decide whether to maintain the monetary bond by making an “individualized determination of the defendant's risk of non-appearance, risk of harm to others or the community, and the defendant's financial circumstances,” as required by Rule 7.3(c)(2).

The proposed amendments to Rules 4.2 and 6 of the Rules of Criminal Procedure provide representation of indigent defendants at the proposed bail review hearing. For those charged with misdemeanors, courts would be required to appoint either an attorney or a licensed legal paraprofessional to represent the defendant at the bail review hearing. Under current rules, counsel may not be appointed for indigent defendants at the initial appearance because charges that may result in imprisonment have not been filed. Additionally, the Fair Justice

Task Force noted, “In misdemeanor matters, a prosecutor may file a charge that could result in imprisonment but specify that it will not be requested as part of the sentence. Such a declaration makes the defendant ineligible for a court-appointed lawyer.”<sup>3</sup> Consequently, an unrepresented indigent defendant may be unnecessarily detained because relevant information that would justify release on conditions the defendant can satisfy has not been presented to the court fully and fairly by an advocate. The right to representation at a bail review hearing as proposed by this petition bridges this gap in the Arizona criminal justice process. Additionally, the presentation of relevant evidence by both the state and the defense would greatly enhance the ability of the court to impose conditions of release that best serve the multiple purposes of bail in selecting among the eleven non-mandatory bail conditions provided in Rule 7.3, taking into account all fifteen considerations provided in A.R.S. §13-3967 and the requirements of Rule 7.2.

Legal paraprofessionals (LPs) authorized by Supreme Court Rule 31.3(e)(4) are proposed as an option to be appointed by the court to provide misdemeanor detainees representation limited to the proposed bail review hearings. Limited Jurisdiction Criminal is a permitted area of practice for legal paraprofessionals under ACJA §7-210(F)(2)(c).

## **II. Preliminary Comments.** While the proposed amendments are

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<sup>3</sup> Justice for All: Report and Recommendation of the Task Force on Fair Justice for All (Arizona Supreme Court, August 16, 2016) at p. 29, available at: <http://www.azcourts.gov/Portals/0/FairJusticeArizonaReport2016.pdf>

consistent with the original Task Force’s recommendations and the prior rule changes made by order of this Court in response to R-16-0041, the specific hearing and appointment of counsel elements and language of this petition have not been circulated to the trial courts or other criminal justice system stakeholders for comment before filing. Therefore, an opportunity for comment as part of the Court’s expedited review is recommended.

**III. Request for Expedited Consideration.** Pursuant to Rule 28(H) of the Rules of the Supreme Court, petitioner requests immediate publication of the proposed rule changes for comment and consideration of this Petition expedited to the 2021 rules agenda.

Wherefore, petitioner respectfully requests that the Court amend the Rules of Criminal Procedure as proposed in the Appendix included herewith.

RESPECTFULLY SUBMITTED this 4th day of February, 2021.

By /S/\_\_\_\_\_  
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## APPENDIX

(language to be removed is shown in ~~strike through~~, new language is underlined)

### **Rule 4.2. Initial Appearance**

**(a) Generally.** At an initial appearance, the magistrate must:

- (1) determine the defendant's true name and address and, if necessary, amend the formal charges to correct the name and instruct the person to promptly notify the court of any change of address;
- (2) inform the defendant of the charges and, if available, provide the person with a copy of the complaint, information, or indictment;
- (3) inform the defendant of the right to counsel and the right to remain silent;
- (4) determine whether there is probable cause for purposes of release from custody, and, if no probable cause is found, immediately release the person from custody;
- (5) appoint ~~counsel~~ an attorney if the defendant ~~requests and~~ is eligible for appointed counsel under Rule 6.1 (b);
- (6) appoint either an attorney or a legal paraprofessional under Rule 6.1 (c) to represent a defendant for a bail review hearing if the defendant is detained with a bond that requires payment of money prior to release.
- ~~(67)~~ permit and consider any victim's oral or written comments concerning the defendant's possible release and conditions of release;
- ~~(78)~~ unless the magistrate determines under (a) ~~(89)~~ that release on bail is prohibited, determine the conditions of release under Rule 7.2(a);
- ~~(89)~~ determine whether probable cause exists to believe:
  - (A) the defendant committed a capital offense or any felony offense



committed while the person was on pretrial release for a separate felony charge; or

(B) the defendant committed a felony for which release on bail is prohibited because the defendant poses a substantial danger and no conditions of release will reasonably assure the safety of the victim, any other person, or the community based on the considerations provided in Rule 7.2(b)(3);

(910) if the court determines that the defendant is not eligible for bail based on a determination under (a)(89)(A) or (B), schedule a bail eligibility hearing in superior court as required under Rule 7.2(b)(4);

(4011) order a summoned defendant to be 10-print fingerprinted no later than 20 calendar days by the appropriate law enforcement agency at a designated time and place if:

(A) the defendant is charged with a felony offense, a violation of A.R.S. §§ 13-1401 et seq. or A.R.S. §§ 28-1301 et seq., or a domestic violence offense as defined in A.R.S. § 13-3601; and

(B) the defendant does not present a completed mandatory fingerprint compliance form to the court, or if the court has not received the process control number; and

(4412) order the arresting agency to secure a sample of buccal cells or other bodily substances for DNA testing if:

(A) the defendant is in-custody and was arrested for an offense listed in A.R.S. § 13-610(O)(3); and

(B) the court has not received proof of compliance with A.R.S. § 13-610(K).

**(b) Felonies Charged by Complaint.** If a defendant is charged in a complaint with a felony, in addition to following the procedures in (a), the

magistrate must:

- (1) inform the defendant of the right to a preliminary hearing and the procedures by which that right may be waived; and
- (2) unless waived, set the time for a preliminary hearing under Rule 5.1.

**(c) Combining an Initial Appearance with an Arraignment.** If the defendant is charged with a misdemeanor or indicted for a felony and defense counsel is present or the defendant waives the presence of counsel, the magistrate may arraign a defendant under Rule 14 during an initial appearance under (a). If, however, the magistrate lacks jurisdiction to try the offense, the magistrate may not arraign the defendant and must instead transfer the case to the proper court for arraignment. If the court finds that delaying the defendant's arraignment is indispensable to the interests of justice, the court when setting a date for the continued arraignment must provide sufficient notice to victims under Rule 39(b)(2).

**Rule 6.1. Right to Counsel; ~~Right to a Court-Appointed~~ Appointment of an Attorney or Legal Paraprofessional; Waiver of the Right to Counsel**

**(a) Right to Be Represented by Counsel.** A defendant has the right to be represented by counsel in any criminal proceeding. The right to be represented by counsel includes the right to consult privately with counsel, or the counsel's agent, as soon as feasible after a defendant has been taken into custody, at reasonable times after being taken into custody, and sufficiently in advance of a proceeding to allow counsel to adequately prepare for the proceeding.

**(b) Right to a ~~Court-Appointed~~ Appointment of an Attorney.**

- (1) *As of Right.* An indigent defendant is entitled to a court-appointed

attorney: ~~(A)~~ in any criminal proceeding that may result in punishment involving a loss of liberty; ~~or~~

~~(B) for the limited purpose of determining release conditions at or following the initial appearance, if the defendant is detained after a misdemeanor charge is filed.~~

(2) *Discretionary*. In any other criminal proceeding, the court may appoint an attorney for an indigent defendant if required by the interests of justice.

~~(3) *Definition of "Indigent."* For the purposes of this rule, "indigent" means a person who is not financially able to retain counsel.~~

**(c) Right to Appointment of Attorney or Legal Paraprofessional for Pre-Trial Release.**

An indigent defendant who remains in custody after the initial appearance is entitled to the appointment of an attorney in a felony or a misdemeanor case or a legal paraprofessional in a misdemeanor case for the limited purpose of advocating pre-trial release of the defendant.

**(ed) Waiver of Right to Counsel.** A defendant may waive the right to counsel if the waiver is in writing and if the court finds that the defendant's waiver is knowing, intelligent, and voluntary. After a defendant waives the right to counsel, the court may appoint advisory counsel for the defendant at any stage of the proceedings. In all further matters, the court must give advisory counsel the same notice that is given to the defendant.

**(de) Unreasonable Delay in Retaining Counsel.** If a defendant appears at a proceeding without counsel, the court may proceed if:

(1) the defendant is indigent and has refused appointed counsel; or

(2) the defendant is not indigent and has had a reasonable opportunity to obtain counsel.

**(ef) Withdrawal of Waiver.** A defendant may withdraw a waiver of the right to counsel at any time. But the fact that counsel is later appointed or retained does not alone establish a basis for repeating any proceeding previously held or waived.

**(g) Definition of Indigency.**

For the purposes of this rule, “indigent” means a person who is not financially able to retain counsel.

## **6.5. Manner of Appointment**

**(a) Appointment Order.** The court must appoint counsel or a legal paraprofessional by a written order and provide a copy of the order to the defendant, the appointed attorney or legal paraprofessional, and the State.

**(b) Public Defender Appointment.** In counties that have a public defender, the court must appoint the public defender to represent persons entitled to appointed counsel whenever the public defender is authorized by law to undertake the representation and is able to do so.

**(c) Other Appointments.** If the court does not appoint a public defender, the court must appoint a private attorney or legal paraprofessional. In appointing private counsel or a legal paraprofessional, the court must take into account the skill likely to be required in handling the case.

**(d) Requests for Representation Before a Grand Jury.** A request for appointment of counsel must be made and processed as if proceedings had already begun in superior court.

## **6.6. Compensation of Appointed Counsel or Legal Paraprofessional**

**(a) Where to File a Compensation Claim.** A private attorney appointed to represent an indigent defendant must file a claim for compensation as

provided by local rule in the county in which the appointment was made or from which the appeal was taken.

**(b) When to File a Compensation Claim.**

(1) *Trial Court.* Trial counsel may file claims for compensation at intervals permitted by the court, and must file a final claim at the completion of all trial, sentencing, or post-conviction proceedings.

(2) *Appellate Court.* Appellate counsel may file claims for compensation at intervals permitted by the court, and must file a final claim at the completion of all appellate proceedings.

**(c) Proceedings in a Limited Jurisdiction Court.** An attorney or legal paraprofessional is entitled to compensation for services rendered in a limited jurisdiction court.

**(d) Amount of Compensation.** An attorney or legal paraprofessional must be reasonably compensated for the services performed, considering the hours worked, the experience of counsel or the legal paraprofessional, the seriousness and complexity of the case, or the work performed, the quality of the work performed, and any other relevant factors. The manner of determining reasonable compensation is provided by local rule and A.R.S. § 13-4013.

**Rule 7.2. Right to Release**

**(a) Before Conviction; Bailable Offenses.**

(1) *Presumption of Innocence.* A defendant charged with a crime but not yet convicted is presumed to be innocent.

(2) *Right to Release.* Except as these rules otherwise provide, any defendant charged with an offense bailable as a matter of right must be released pending and during trial on the defendant's own recognizance

with only the mandatory conditions of release required under Rule 7.3(a): ~~This rule does not apply if such a release will not reasonably~~ unless the court determines that additional conditions are necessary to assure the defendant's appearance or protect the victim, any other person, or the community from risk of harm by the defendant. If the court makes such a determination, it must impose the least onerous conditions of release set forth in Rule 7.3(c). A bond need not and must not be imposed for a defendant detained on another charge solely to receive credit for time served.

(3) *Determining Method of Release or Bail Amount.* In determining the method of release or the amount of bail, the court must ~~consider~~ take into account all of the factors set forth in A.R.S. § 13-3967(B).

**b) Before Conviction: Defendants Charged with an Offense Not Eligible for Bail.**

(1) *Not Eligible Based on Commission of a Specified Felony or Any Felony While on Pretrial Release.* A defendant must not be released if the court finds the proof is evident or the presumption great that the defendant committed:

- (A) a capital offense;
- (B) any felony offense while the defendant was on pretrial release for a separate felony charge.

(2) *Not Eligible Based on Commission of any Felony and Other Factors.* Under article 2, section 22(A)(3) of the Arizona Constitution, the court may not release any defendant charged with a felony if the court finds all of the following:

- (A) the proof is evident or the presumption great that the defendant committed one or more of the charged felony offenses;

(B) clear and convincing evidence that the defendant poses a substantial danger to the victim, any other person, or the community or, on certification by motion of the state, the defendant engaged in conduct constituting a dangerous crime against children or terrorism; and

(C) no condition or combination of conditions of release will reasonably assure the safety of the victim, any other person, or the community.

(3) *Bail Eligibility Considerations.* In making the determinations required by (b)(2)(B) and (b)(2)(C), the court must consider:

(A) the nature and circumstances of the offense charged, including whether the offense is a “dangerous offense” as defined in A.R.S. § 13-105;

(B) the weight of the evidence against the defendant;

(C) the history and characteristics of the defendant, including the defendant's character, physical and mental condition, past conduct including membership in a criminal street gang, history relating to drug or alcohol abuse, and criminal history;

(D) the nature and seriousness of the danger to the victim, any other person, or the community that would be posed by releasing the defendant on bail, including any threat to a victim or other participants in the judicial process;

(E) the recommendation of the pretrial services program based on an appropriate risk assessment instrument;

(F) any victim statement about the offense and release on bail; and

(G) any other factor relevant to the determination required under (b)(2)(B) and (b)(2)(C).

(4) *Bail Eligibility Hearing.*

(A) Generally. The superior court must hold a hearing to determine

whether a defendant held in custody under Rule 4.2(a)(89) is not eligible for bail as required under (b)(1) or (b)(2), unless the defendant waives this hearing.

(B) Timing. If the State makes an oral motion under A.R.S. § 13-3961(E), the court must hold this hearing within 24 hours of the initial appearance, subject to continuances as provided in A.R.S. § 13-3961. If this motion is not made, the hearing must be held as soon as practicable, but no later than 7 days after the initial appearance unless the detained defendant moves for a continuance or the court finds that extraordinary circumstances exist and delay is indispensable to the interests of justice. For this purpose, extraordinary circumstances are events that would prohibit the hearing from occurring and that are beyond the prosecutor's control. Upon a finding of extraordinary circumstances, the court may continue the hearing once and for no more than 3 calendar days.

(C) Determination of Probable Cause and Release Conditions. If the court does not find the proof evident or the presumption great under (b)(1) or (b)(2)(A) and there has been no prior finding of probable cause for the charges by a grand jury or through a preliminary hearing, the court must determine whether there is probable cause to believe that an offense was committed and that the defendant committed it.

(i) Probable Cause Found. If the court finds probable cause, or probable cause for the charges was previously determined by a grand jury or through a preliminary hearing, the court must determine release conditions under (a).

(ii) No Probable Cause Found. Unless there was a finding of probable cause for the charges by a grand jury or through a preliminary



hearing, if the court does not find probable cause, the defendant must be released from custody. Upon the State's request, the court must schedule a preliminary hearing as provided in Rule 5.1(a). If the state does not request a preliminary hearing, the court must dismiss the complaint and discharge the defendant, unless probable cause for the charges was previously determined by a grand jury or through a preliminary hearing.

(D) Effect of Findings. If the court finds the proof is evident or the presumption great or finds probable cause, upon the State's request, the court will hold the defendant to answer before the superior court as provided in Rule 5.4(a).

(E) Findings on the Record. The court's findings must be on the record.

**(c) After Conviction.**

**(1) Superior Court.**

(A) Before Sentencing. After a defendant is convicted of an offense for which the defendant will, in all reasonable probability, receive a sentence of imprisonment, the court may not release the defendant on bail or on the defendant's own recognizance unless:

- (i) the court finds that reasonable grounds exist to believe that the conviction may be set aside on a motion for new trial, judgment of acquittal, or other post-trial motion; or
- (ii) the parties stipulate otherwise and the court approves the stipulation.

(B) After a Sentence Involving Imprisonment. If a defendant is convicted of a felony offense and is sentenced to prison, the court may not release the defendant on bail or on the defendant's own recognizance pending appeal unless the court finds the defendant is in such a physical

condition that continued confinement would endanger the defendant's life.

(C) Protecting Safety. In determining release conditions if the defendant is released under (c)(1)(A) or (B), the court must impose conditions that will protect the victim, any other person, or the community from risk of harm by the defendant.

(D) After Sentence, Pending Appeal. If a defendant is released pending appeal but fails to diligently pursue the appeal, the court must revoke the release.

(E) Release upon Sentence Completion. A defendant held in custody pending appeal must be released if the term of incarceration is completed before the appeal is decided.

(2) *Limited Jurisdiction Courts.*

(A) Conditions of Release on Appeal. If a defendant files a timely notice of appeal of a conviction for an offense for which the court has imposed a sentence of incarceration, the defendant may remain out of custody under the same conditions of release imposed at or after the defendant's initial appearance or arraignment.

(B) Lack of Diligence on Appeal. If a defendant is released pending appeal but fails to diligently pursue the appeal, the court must revoke the release.

(C) Motion to Amend Conditions of Release.

(i) Upon the filing of a timely notice of appeal, the court--on motion or on its own--may amend the conditions of release if it finds a substantial risk exists that the defendant presents a danger to the victim, another person or the community, or the defendant is unlikely to return to court if required to do so after the appeal concludes.

(ii) The court must hear a motion under this rule no later than 3 days after filing, although it may continue the hearing for good cause. The defendant may be detained pending the hearing. The hearing must be on the record, and the defendant is entitled to representation by counsel. Any testimony by the defendant is not admissible in another proceeding except as it relates to compliance with prior conditions of release, perjury, or impeachment. The court must state its findings on the record.

(iii) The court may amend the conditions of release in accordance with the standards set forth in Rule 7.3 and Rule 7.4(~~b~~c). In determining the method of release or the amount of bail, the court must consider the nature and circumstances of the offense, family or local ties, employment, financial resources, the defendant's character and mental condition, the length of residence in the community, the record of arrests or convictions, the risk of harm to the victim, other persons, or the community, and appearances at prior court proceedings.

(D) Release upon Sentence Completion. A defendant held in custody pending appeal must be released if the defendant's term of incarceration is completed before the appeal is decided.

(E) Superior Court Review. If the trial court enters an order setting a bond or requiring incarceration during the appeal, the defendant may petition the superior court to stay the execution of sentence and to allow the defendant's release either without bond or on a reduced bond.

**(d) Burden of Proof.** A court must determine issues under (a) and (c) by a preponderance of the evidence. The State bears the burden of establishing factual issues under (a), (b) and (c)(2). The defendant bears the burden of

establishing factual issues under (c)(1).

#### **Rule 7.4. Procedure**

**(a) Initial Appearance.** At an initial appearance, the court must determine bail eligibility and the conditions for release. If the court decides that the defendant is eligible for release, the court must issue an order containing the conditions of release. The order must inform the defendant of the conditions and possible consequences for violating a condition, and that the court may immediately issue a warrant for the defendant's arrest if there is a violation.

**(b) Denial of Release Due to Inability to Post Bond.** If a defendant is unable to post a bond required for release, the court must schedule a bail review hearing to determine whether the court should modify bail to impose only non-monetary conditions or less onerous monetary conditions of release.

(1) Timing. The hearing must be held as soon as practicable, but no later than five days after the initial appearance for a person charged with a misdemeanor and no later than 7 days after the initial appearance for a person charged with a felony unless the detained defendant moves for a continuance or the court finds that extraordinary circumstances exist and delay is indispensable to the interests of justice.

(2) Burden of Proof. The state has the burden to prove by a preponderance of the evidence that the bond is reasonable and necessary under Rule 7.3(c) taking into account all of the factors provided in A.R.S. § 13-3967(B) and, if available, a recommendation of a pretrial services program that is based on an appropriate risk assessment instrument.

(3) Court Order. The court must enter an order explaining its conclusion based upon all evidence presented at the hearing.

**(bc) Bail Review and Bail Eligibility Hearing; Procedures.**

(1) *Right to Secure Witnesses, Cross-Examine, and Review Witness Statements.* At a bail review and a bail eligibility hearing, each party has the right to secure the attendance of witnesses, cross-examine any witness who testifies, and to review any previous written statement by the witness before cross-examination.

(2) *Victims.* Notwithstanding the time limits of Rule 39(g)(1), a victim must be afforded the rights provided in Rule 39(g).

(3) *Admissibility.* Evidence is admissible at ~~the~~ a bail review hearing and at a bail eligibility hearing only if it is material to whether, and under what conditions, to release the defendant on bail. ~~and~~ Additionally, evidence that is material to whether probable cause exists to hold the defendant for trial on each charge is admissible at a bail eligibility hearing.

(4) Rules or objections calling for the exclusion of evidence are inapplicable at a bail review and a bail eligibility hearing.

**(ed) Later Review of Conditions.**

(1) *Generally.* On motion or on its own, a court may reexamine bail eligibility or the conditions of release if the case is transferred to a different court or a motion alleges either the existence of material facts not previously presented to the court or the defendant is unable to post the bond ordered as a condition of release.

(2) *Motion Requirements and Hearing.* The court may modify the conditions of release only after giving the parties an opportunity to respond to the proposed modification. A motion to reexamine the conditions of release must comply with victims' rights requirements provided in Rule 39.

(3) *Eligibility for Bail.* If the motion is by the State and involves a defendant

previously held eligible for bail at the initial appearance, it need not allege new material facts. The court must hold a hearing on the record as soon as practicable, but no later than 7 days after the motion's filing.

**(de) Evidence.** A court may base a release determination under this rule on evidence that is not admissible under the Arizona Rules of Evidence.

**(ef) Defendant's Bail Status.** If the court makes the findings required under Rule 7.2(b)(1) or (b)(2) to deny bail, the court must order the defendant held without bail until further order. If not, the court must order the defendant released on bail under Rule 7.2(a).

~~**(f) Review of Conditions of Release for Misdemeanors.** No later than 10 days after arraignment, the court must determine whether to amend the conditions of release for any defendant held in custody on bond for a misdemeanor.~~

**(g) Appointment of Counsel.** The court must appoint counsel in any case in which the defendant is eligible for the appointment of counsel under Rule 6.1(b).